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CAROLYN MARTIN

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CAROLYN MARTIN

Plaintiff,

v.

LOEHMANN'S, INC.; 222 SUTTER LP;  
and DOES 1-25, Inclusive,

Defendants.

CASE NO. C 02 4616 CW ADR  
Civil Rights

**FIRST AMENDED  
COMPLAINT FOR PRELIMINARY AND  
PERMANENT INJUNCTIVE RELIEF  
AND DAMAGES: DENIAL OF CIVIL  
RIGHTS AND ACCESS TO PUBLIC  
FACILITIES TO PHYSICALLY  
DISABLED PERSONS, (§54, §54.1, §55  
CIVIL CODE; §19955 ff HEALTH &  
SAFETY CODE); INJUNCTIVE RELIEF  
PER TITLE III, AMERICANS WITH  
DISABILITIES ACT OF 1990**

**DEMAND FOR JURY TRIAL**

Plaintiff CAROLYN MARTIN complains of Defendants above named, and each of them,  
and alleges as follows:

**FIRST CAUSE OF ACTION: DAMAGES AND INJUNCTIVE RELIEF  
FOR DENIAL OF FULL AND EQUAL ACCESS TO A PUBLIC  
ACCOMMODATION: PUBLIC FACILITIES IN A PUBLIC FACILITY  
(§§19955 Et. Seq., Health & Safety Code, §54.1 Civil Code)**

1. Plaintiff Carolyn Martin is a "person with a disability" or "physically handicapped"

1 person.”<sup>1</sup> Plaintiff requires the use of a wheelchair for locomotion and is unable to use portions  
 2 of public facilities which are not accessible to disabled persons who require the use of a wheelchair.

3       2.       **SUMMARY:** This case involves the lack of disabled accessible entry, paths of  
 4 travel, circulation, services, and other facilities to Plaintiff and other disabled persons at the  
 5 Loehmann’s clothing store at 222 Sutter Street, San Francisco, California (hereafter the “store”).  
 6 Plaintiff was denied equal protection of the law and was denied Civil Rights under both California  
 7 law and federal law. Plaintiff was denied her rights to full and equal access at the store because  
 8 it was not, and is not now, a facility properly accessible to physically disabled persons such as  
 9 Plaintiff who use wheelchairs. Plaintiff seeks injunctive relief to require Defendants to make these  
 10 specified facilities accessible to disabled persons and to ensure that any disabled person who  
 11 attempts to shop at the store and to use the facilities will be provided accessible entry, proper  
 12 accessible paths of travel, and proper access to all the facilities at the store. Plaintiff also seeks  
 13 recovery of damages for her personal injuries and discriminatory experiences and denial of access,  
 14 which is continuing as a result of Defendant's failure and refusal to provide accessible facilities,  
 15 and seeks recovery of reasonable attorneys' fees, litigation expenses and costs, according to statute.

16       3.       **JURISDICTION:** This Court has jurisdiction of this action pursuant to 28 USC  
 17 §1331 for violations of the Americans with Disabilities Act of 1990, 42 USC 12101 *et seq.*  
 18 Pursuant to pendant jurisdiction, attendant and related causes of action arising from the same facts  
 19 are also brought under California law, including but not limited to violations of California  
 20 Government Code §4450, *et. seq.*, Health & Safety Code §19955 *et seq.*, including §19959; Title  
 21 24 California Code of Regulations; and California Civil Code §§ 54, 54.1 and 55.

22       4.       **VENUE:** Venue is proper in this court pursuant to 28 USC 1391(b) and is founded  
 23 on the fact that the real property which is the subject of this action is located in this district and that  
 24 Plaintiff's causes of action arose in this district.

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25  
 26       <sup>1</sup> (Hereinafter, the words "physically handicapped" and "physically disabled" are used  
 27 interchangeably as these words have similar or identical common usage and legal meaning, but the  
 28 legislative scheme in Part 5.5 Health & Safety Code uses the term "physically handicapped persons," and  
 the statutes protecting “Blind and other physically disabled persons,” §§54, 54.1, 54.3 and 55 Civil Code  
 and other statutory measures refer to the protection of the rights of "individuals with disabilities.")

1           5.       **INTRADISTRICT:** This case should be assigned to the San Francisco intradistrict  
 2 as the real property which is the subject of this action is located in the said intradistrict and  
 3 Plaintiff's causes of action arose in the said intradistrict.

4           6.       **PARTIES:** Defendants are the owners, operators, lessors, and lessees of the  
 5 property, building and/or portions thereof located at 222 Sutter Street, San Francisco, California  
 6 This building is a "public accommodation or facility" subject to the requirements of California  
 7 Health & Safety Code §19955 et seq. and of California Civil Code §54, et seq. On information and  
 8 belief, such facility has, since July 1, 1970, undergone construction and/or "alterations, structural  
 9 repairs, or additions" subjecting such building to disabled access requirements per §19955-19959,  
 10 et. seq. Health & Safety Code.

11           7.       The true names and capacities of Defendants Does 1 through 25, Inclusive, are  
 12 unknown to Plaintiff who therefore sues said Defendants by such fictitious names; Plaintiff is  
 13 informed and believes that each of the Defendants herein designated as a Doe is legally responsible  
 14 in some manner for the events and happenings herein referred to and caused injury and damages  
 15 proximately thereby to Plaintiff ; Plaintiff prays leave of Court to amend this Complaint to show  
 16 such true names and capacities when the same have been ascertained.

17           8.       Defendants and DOES 1-25, Inclusive, are and were the owners, operators, lessors,  
 18 and/or lessees of the subject property and/or building at all times relevant to this Complaint.  
 19 Plaintiff is informed and believes that each of the Defendants herein is the agent, employee or  
 20 representative of each of the other Defendants, and performed all acts and omissions stated herein  
 21 within the scope of such agency or employment or representative capacity and is responsible in  
 22 some manner for the acts and omissions of the other Defendants in proximately causing the  
 23 damages complained of herein.

24           9.       Plaintiff and other similarly situated physically disabled persons who require the  
 25 use of a wheelchair are unable to use public facilities on a "full and equal" basis unless each such  
 26 facility is in compliance with the provisions of California Health & Safety Code §19955 et. seq.  
 27 Plaintiff is a member of that portion of the public whose rights are protected by the provisions of  
 28 §19955 et seq. Health & Safety Code.

1           10.     §§19955 and 19955.5 Health & Safety Code were enacted "To ensure that public  
2 accommodations or facilities constructed in this state with private funds adhere to the provisions  
3 of Chapter 7 (commencing with §4450) of Division 5 of Title 1 of the Government Code." Such  
4 public accommodations also require that "When sanitary facilities are made available for the  
5 public, clients, or employees ..., they shall be made available for persons with disabilities." Title  
6 24, California Code of Regulations, formerly known as the California Administrative Code, was  
7 in effect at the time of each alteration which, on information and belief, occurred at such public  
8 facility since July 1, 1982, thus requiring access complying with the specifications of Title 24  
9 whenever each such "alteration, structural repair or addition" is carried out. On information and  
10 belief, Defendants have carried out alterations, structural repairs, or additions to the building  
11 during the period Title 24 has been in effect. On information and belief, alterations, structural  
12 repairs, or additions which triggered access requirements also occurred between July 1, 1970 and  
13 July 1, 1982, and required access pursuant to the A.S.A. (American Standards Association)  
14 Regulations then in effect, pursuant to the incorporated provisions of §4450ff Government Code.

15           11.     On or about May 31, June 1, and June 4, 2002 Plaintiff was a customer shopping  
16 and making purchases at the store. On each occasion, Plaintiff encountered numerous obstacles  
17 which prevented her from obtaining full and equal access to the store and its facilities. On each  
18 occasion, Plaintiff could not access the store from its main entrance because steps block access to  
19 the store interior for persons such as Plaintiff who require the use of a wheelchair for mobility. On  
20 each occasion, Plaintiff was required to use a secondary entrance into an office building which  
21 contains a side entrance to the main level of the store and an elevator to the basement level of the  
22 building and a secondary entrance on the basement level. In this regard, both the door to the office  
23 building and the secondary doors to the store interior require the application of pressure in excess  
24 of that required by State and Federal law, and Plaintiff had to struggle to gain entry to both the  
25 building itself and the interior of store on each occasion. In addition, on Plaintiff's June 1, 2002  
26 encounter, she found the entry door to the office building locked, which forced Plaintiff to return  
27 to the main entry to the store and to yell inside for assistance from a store employee in gaining  
28 access to the office building. Once inside the store, Plaintiff was unable to go between floor levels

1 on the interior of the store because there is no interior elevator: in order to go from one store level  
2 to another, Plaintiff was required to exit the store, take the office building elevator between levels,  
3 and re-enter the store. Once inside each store level, Plaintiff encountered great difficulty in  
4 shopping because the aisle way space between the majority of racks of clothing on both levels was  
5 and is too narrow to permit a person in a wheelchair to navigate and is narrower than permitted by  
6 State and Federal law. In fact, on one of her store visits a rack that Plaintiff was trying to move  
7 out of her way fell on Plaintiff, and on another of her store visits merchandise got caught in her  
8 wheelchair which prevented her from moving until she obtained assistance from an employee to  
9 free her wheelchair from the merchandise. As a result of being denied access as described above,  
10 Plaintiff has been denied full and equal access in violation of her civil rights, all to her  
11 embarrassment and humiliation, and she has suffered personal injuries and actual and statutory  
12 damages according to proof.

13 12. In addition to the lack of proper and accessible access at the store identified in the  
14 next preceding paragraph, this public facility is inaccessible to persons with disabilities in other  
15 aspects, including but not limited to the following: lack of proper disabled accessible restrooms;  
16 lack of contrast striping on stairs; lack of proper kickplates on doors; lack of proper strike side  
17 clearance on the basement level entry door; lack of accessible dressing rooms; lack of accessible  
18 drinking fountains; and lack of proper disabled signage and symbols, all rendering the property  
19 inaccessible to and unuseable by disabled persons. The facilities should be brought into  
20 compliance with all applicable code requirements.

21 13. Further, any violation of the Americans With Disabilities Act of 1990, (as pled in  
22 the Second Cause of Action hereinbelow, the contents of which are repled and incorporated herein,  
23 word for word, as if separately repled), also constitutes a violation of §54(c) California Civil Code,  
24 thus independently justifying an award of damages and injunctive relief pursuant to California law,  
25 including but not limited to §§54.3 and 55 Civil Code.

26 14. Further, any violation of the Americans With Disabilities Act of 1990, (as pled in  
27 the Second Cause of Action hereinbelow, the contents of which are repled and incorporated herein,  
28 word for word, as if separately repled), also constitutes a violation of §54.1(d) California Civil

1 Code, thus independently justifying an award of damages and injunctive relief pursuant to  
2 California law, including but not limited to §§54.3 and 55 Civil Code.

3 15. **INJUNCTIVE RELIEF:** Plaintiff seeks injunctive relief to prohibit the acts and  
4 omissions of Defendants as complained of herein which are continuing on a day-to-day basis and  
5 which have the effect of wrongfully excluding Plaintiff and other members of the public who are  
6 physically disabled wheelchair users from full and equal access to that public facility. Such acts  
7 and omissions are the cause of humiliation and mental and emotional suffering of Plaintiff in that  
8 these actions continue to treat Plaintiff as an inferior and second class citizen and serve to  
9 discriminate against her on the sole basis that she is a person with disabilities and requires the use  
10 of a wheelchair for movement in public places; Plaintiff, who wishes to return to the store, is  
11 unable, so long as such acts and omissions of Defendants continue, to achieve equal access to and  
12 use of this public building and its facilities. The acts of Defendants have proximately caused and  
13 will continue to cause irreparable injury to Plaintiff if not enjoined by this court.

14 16. **DAMAGES:** As a result of the denial of equal access to the facility and due to the  
15 acts and omissions of Defendants and each of them in owning, operating, leasing, constructing,  
16 altering, and maintaining the subject facility, Plaintiff suffered a violation of her Civil Rights  
17 including but not limited to rights under §§ 54 and 54.1 Civil Code, and suffered personal injuries,  
18 physical discomfort and pain, mental and emotional distress, embarrassment and humiliation, all  
19 to her damages as hereinafter stated. Defendants' actions and omissions to act constitute  
20 discrimination against Plaintiff on the sole basis that she was and is physically disabled and unable,  
21 because of the architectural barriers created and/or maintained by the Defendants in violation of  
22 the subject laws, to use the facilities on a full and equal basis as other persons. Plaintiff also seeks  
23 trebling of all actual damages, general and special, as provided by §54.3 Civil Code.

24 17. **PUNITIVE DAMAGES:** On information and belief, Defendants have been aware  
25 prior to Plaintiff's described encounter that their denial of access and their lack of accessible  
26 facilities at the building was denying "full and equal access" to disabled persons such as Plaintiff  
27 and would continue to deny such access on a daily basis until fully accessible facilities were  
28 provided for disabled persons.

18. On information and belief, Defendants' acts and omissions in failing to provide the required accessible facilities prior to and subsequent to Plaintiff's encounter and injuries, so that these facilities could properly and safely be used by disabled persons, indicate actual and implied malice toward Plaintiff and other disabled persons, and constitute despicable conduct by Defendants with a willful and conscious disregard for the rights and safety of Plaintiff and of other disabled persons, and justify punitive and exemplary damages pursuant to §3294 Civil Code in an amount sufficient to make an example of Defendants and to carry out the purposes of §3294 Civil Code.

19. **FEES AND COSTS:** As a result of Defendants' acts, omissions, and conduct, Plaintiff has been required to incur attorneys' fees, litigation expenses, and costs as provided by statute, in order to enforce Plaintiff's rights and to enforce provisions of the law protecting access for disabled persons and prohibiting discrimination against disabled persons. Plaintiff therefore seeks recovery of all reasonable attorney's fees, litigation expenses, and costs, pursuant to the provisions of §§54.3 and 55 Civil Code. Additionally, Plaintiff's lawsuit is intended not only to obtain compensation for damages to Plaintiff, but also to force the Defendants to make their facilities accessible to all disabled members of the public, justifying "public interest" attorneys' fees, litigation expenses and costs pursuant to the provisions of §1021.5 Code of Civil Procedure and other applicable law.

20. Wherefore Plaintiff asks this court to preliminarily and permanently enjoin any continuing refusal by Defendants to grant full and equal access to Plaintiff and to require Defendants to comply forthwith with the applicable statutory requirements relating to access for disabled persons. Such injunctive relief is provided by §19953 Health & Safety Code and California Civil Code §55, and other law. Plaintiff further requests that the court award damages pursuant to Civil Code §54.3 and other law and attorney fees, litigation expenses, and costs pursuant to §19953 Health & Safety Code, Civil Code §54.3 and 55, Code of Civil Procedure §1021.5 and other law, all as hereinafter prayed for.

Wherefore Plaintiff prays for relief as hereinafter stated:

## **SECOND CAUSE OF ACTION:**



**VIOLATION OF THE AMERICANS WITH DISABILITIES ACT OF 1990**  
**42 USC §12101FF**

21. Plaintiff repleads and incorporates by reference, as if fully set forth herein, the allegations contained in Paragraphs 1 through 20 of this Complaint, and incorporates them herein as if separately repled.

22. Pursuant to law, in 1990 the United States Congress made findings per 42 USC §12101 regarding physically disabled persons, finding that laws were needed to more fully protect "some 43 million Americans [with] one or more physical or mental disabilities;" that "historically society has tended to isolate and segregate individuals with disabilities;" that "such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;" that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living and economic self sufficiency for such individuals;" and that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous. . . ."

23. Congress stated as its purpose in passing the Americans with Disabilities Act (42 USC §12101(b))

It is the purpose of this act

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal government plays a central role in enforcing the standards established in this act on behalf of individuals with disabilities; and

(4) to invoke the sweep of Congressional authority, including the power to enforce the 14th Amendment and to regulate commerce, in order to address the major areas of discrimination faced day to day by people with disabilities. (Emphasis added)

24. As part of the Americans with Disabilities Act, Public Law 101-336, (hereinafter the "ADA"), Congress passed "Title III - Public Accommodations and Services Operated by Private Entities" (42 USC 12181ff). Defendants are "private entities" which are considered "public accommodations" for purposes of this title. .



1           25. Pursuant to §302, 42 USC §12182, "No individual shall be discriminated against  
2 on the basis of disability in the full and equal enjoyment of the goods, services, facilities,  
3 privileges, advantages, or accommodations of any place of public accommodation by any person  
4 who owns, leases, or leases to, or operates a place of public accommodation."

5           26. Among the specific prohibitions against discrimination were included:

6 §302(b)(2)(A)(ii): "A failure to make reasonable modifications in policies, practices or procedures  
7 when such modifications are necessary to afford such goods, services, facilities, privileges,  
8 advantages or accommodations to individuals with disabilities...;"

9 §302(b)(A)(iii): "a failure to take such steps as may be necessary to ensure that no individual with  
10 a disability is excluded, denied service, segregated, or otherwise treated differently than other  
11 individuals because of the absence of auxiliary aids and services...;"

12 §302(b)(2)(A)(iv): "A failure to remove architectural barriers, and communication barriers that are  
13 structural in nature, in existing facilities... where such removal is readily achievable;"

14 §302(b)(2)(A)(v): "Where an entity can demonstrate that the removal of a barrier under clause (iv)  
15 is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages,  
16 or accommodations available through alternative methods if such methods are readily achievable."

17 The acts and omissions of Defendants set forth herein were in violation of Plaintiff's rights under  
18 the ADA, Public Law 101-336, and the regulations promulgated thereunder, 28 CFR Part 36ff.

19           27. The removal of each of the barriers complained of by Plaintiff as hereinabove  
20 alleged, were at all times herein mentioned "readily achievable" under the standards of the  
21 Americans With Disabilities Act. As noted hereinabove, removal of each and every one of the  
22 architectural barriers complained of herein were also required under California law. Further, and  
23 on information and belief, alterations, structural repairs or additions since January 26, 1992 have  
24 also independently triggered requirements for removal of barriers to access for disabled persons  
25 per §303 of the ADA, as well as per §19959 California Health and Safety Code.

26           28. On information and belief, as of the dates of Plaintiff's encounter at the premises  
27 and the filing of this Complaint, the premises have denied and continue to deny full and equal  
28 access to Plaintiff and to other disabled wheelchair users in other respects, which violated

1 Plaintiff's rights to full and equal access and which discriminated against Plaintiff on the basis of  
 2 her disability, thus wrongfully denying to Plaintiff the full and equal enjoyment of the goods,  
 3 services, facilities, privileges, advantages and accommodations, in violation of §302 of the ADA,  
 4 42 USC §12182.

5 29. Pursuant to the Americans with Disabilities Act, 42 USC 12188ff, §308, Plaintiff  
 6 is entitled to the remedies and procedures set forth in §204(a) of the Civil Rights Act of 1964, 42  
 7 USC 2000(a)-3(a), as Plaintiff is being subjected to discrimination on the basis of disability in  
 8 violation of this title or has reasonable grounds for believing that she is about to be subjected to  
 9 discrimination in violation of §302 and §303. On information and belief, Defendants have  
 10 continued to violate the law and deny the rights of Plaintiff and other disabled persons access to  
 11 this public accommodation since on or before Defendant's encounters as previously discussed.  
 12 Pursuant to §308(a)(2), "In cases of violations of §302(b)(2)(A)(iv) and §303(a)...injunctive relief  
 13 shall include an order to alter facilities to make such facilities readily accessible to and usable by  
 14 individuals with disabilities to the extent required by this title."

15 30. Plaintiff seeks relief pursuant to remedies set forth in §204(a) of the Civil Rights  
 16 Act of 1964, (42 USC 2000(a)-3(a), and pursuant to Federal Regulations adopted to implement the  
 17 Americans with Disabilities Act of 1990. Plaintiff is a person for purposes of Section 308(a) of  
 18 the ADA who is being subjected to discrimination on the basis of disability in violation of Title  
 19 III and who has reasonable grounds for believing she will be subjected to such discrimination each  
 20 time that she may attempt to use the property and premises.

21 Wherefore Plaintiff prays for relief as hereinafter stated:

## 22 PRAYER

23 Plaintiff prays that this Court:

24 1. Issue a preliminary and permanent injunction directing Defendants as current  
 25 owners, operators, lessors, and/or lessees of the property and premises to modify the above  
 26 described property and premises and related facilities so that each provides adequate access to  
 27 all citizens, including persons with disabilities; and issue a preliminary and permanent injunction  
 28 directing Defendants to provide facilities usable by Plaintiff and similarly situated persons with

1 disabilities, and which provide full and equal access, as required by law;

2 2. Retain jurisdiction over the Defendants until such time as the Court is satisfied that  
3 Defendants' unlawful policies, practices, acts and omissions, and maintenance of inaccessible  
4 public facilities as complained of herein no longer occur, and can not recur;

5 3. Award to Plaintiff all appropriate damages, including but not limited to statutory  
6 damages, general damages and treble damages in an amount within the jurisdiction of the Court,  
7 and punitive damages in an amount sufficient to make an example of Defendants, all according to  
8 proof;

9 4. Award to Plaintiff all reasonable attorneys' fees, litigation expenses, and costs of  
10 this proceeding as provided by law; and

11 5. Grant such other and further relief as this Court may deem just and proper.

12 Dated:

SIDNEY J. COHEN  
PROFESSIONAL CORPORATION

13  
14 By \_\_\_\_\_  
15 Sidney J. Cohen  
16 Attorney for Plaintiff Carolyn Martin

17 **DEMAND FOR JURY TRIAL**

18 Plaintiff hereby demands a jury for all claims for which a jury is permitted.

19 Dated:

SIDNEY J. COHEN  
PROFESSIONAL CORPORATION

20  
21 By \_\_\_\_\_  
22 Sidney J. Cohen  
23 Attorney for Plaintiff Carolyn Martin

24 **CERTIFICATION OF INTERESTED ENTITIES OR PARTIES**

25 Pursuant to Civil Local Rule 3-16, the undersigned certifies that as of this date ,  
26 other than the named parties, there is no interest to report.

27 Dated:

SIDNEY J. COHEN  
PROFESSIONAL CORPORATION

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By \_\_\_\_\_  
Sidney J. Cohen  
Attorney for Plaintiff Carolyn Martin